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No. 05-1671

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CHARLES AND LESA CANAS,
as Natural Guardians and Next Friends of
DEREK CANAS, and DEREK CANAS, Individually,

Petitioners,

v.

AYMAN AL-JABI, M.D.; SHARON J. KAMINER, M.D.;
BOARD OF REGENTS OF THE UNIVERSITY SYSTEM
OF GEORGIA d/b/a MEDICAL COLLEGE OF GEORGIA
HOSPITALS AND CLINICS; and MCG HEALTH, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION FOR RESPONDENTS AYMAN AL-JABI, M.D., SHARON J. KAMINER, M.D., AND MCG HEALTH, INC.

WILLIAM P. FRANKLIN, JR.
LESLIE PICKETT SHEEHAN
OLIVER MANER & GRAY LLP
P.O. Box 10186
Savannah, GA 31412

Attorneys for Respondent Ayman Al-Jabi, M.D.

JAMES S. V. WESTON
HULL, TOWILL, NORMAN,
BARRETT & SALLEY
P.O. Box 1564
Augusta, GA 30903-1564

Attorneys for Respondent MCG Health, Inc.

ADAM L. APPEL*
KIM M. RUDER
CARLOCK COPELAND
SEMLER & STAIR, LLP
2600 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, GA 30303
(404) 522-8220

Attorneys for Respondent Sharon J. Kaminer, M.D.

* *Counsel of Record*

STATEMENT PURSUANT TO RULE 29.6

Respondent, MCG Health, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Cited Authorities	v
Statement of the Case	1
1. Derek's Heart Procedure in 1985	1
2. Drs. Kaminer and Al-Jabi's Treatment of Derek	2
3. Timing of Alleged Malpractice Committed by Drs. Kaminer and Al-Jabi	2
Reasons for Denying the Petition	4
I. This Court Does Not Have Jurisdiction to Review the Constitutionality of The Georgia Medical Malpractice Statutes of Repose and Limitations As There Is No "Final Judgment" As Required By 28 U.S.C. § 1257	4
A. Category 1: "those cases in which there are further proceedings-even entire trials-yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained."	7

Contents

Page

B. Category 2: "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." 8

C. Category 3: "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 9

D. Category 4: "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." 11

II. The Georgia Statutes Do Not Violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. 12

A. Equal Protection 13

Contents

Page

B. Due Process 20

III. Contrary to Petitioners' Claims on Pages 9-10 and 19-30 of Their Petition, There Are Not Square Conflicts Between the Georgia Courts' Constitutional Analyses of its Medical Malpractice Statutes of Limitation and Repose and Other State and Federal Courts' Constitutional Analyses of Those Respective States' Medical Malpractice Statutes of Limitation and Repose. 22

A. Cases cited by Petitioner as conflicting with Georgia courts' constitutional analyses of Georgia's statutes of limitation and repose are distinguishable as: (1) the relevant statutes cited in those cases are dissimilar to Georgia's statutes of limitation and repose; and (2) cases cited by Petitioner were held to be unconstitutional as a matter of state constitutional law, and not as a matter of federal constitutional law. 22

B. Statutes of limitation and repose are exactly those types of legislation which may conflict from state to state because they are examples of social and economic legislation, for which the Equal Protection clause of the Fourteenth Amendment gives legislatures wide latitude to formulate. 27

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Allrid v. Emory University, 285 S.E.2d 521 (Ga. 1982) 25

Brady v. Maryland, 373 U.S. 83 (1963) 9

Brubaker v. Cavanaugh, 741 F.2d 318 (10th Cir. 1984) 17

Carondelet Canal & Navigation Co. v. State of Louisiana, 233 U.S. 362 (1914) 9

Carson v. Maurer, 424 A.2d 825, 831 (N.H. 1980) ... 27

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 16, 21, 25, 26, 28

Christian v. Atha, 598 S.E.2d 895 (Ga. App. 2004) .. 20

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) 14, 28

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 14, 27, 28

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) ...*passim*

Craven v. Lowndes County Hosp. Auth., 437 S.E.2d 308 (Ga. 1993) 19, 20, 26

Crowe v. Humana, Inc., 439 S.E.2d 654 (Ga 1994) ... 19, 20

Cited Authorities

Page

DiAntonio v. Northampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980) 17

Douglas v. Hugh A. Stallings, M.D., Inc., 870 F.2d 1242 (7th Cir. 1989) ..... *passim*

FCC v. Beach Communications, Inc., 508 U.S. 307 (1993) 17

Florida v. Thomas, 532 U.S. 774 (2001) 9, 10

G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) 16

Gronne v. Abrams, 793 F.2d 74 (2nd Cir. 1986) 17

Heller v. Doe, 509 U.S. 312 (1993) 17

Hoffman v. United States, 767 F.2d 1431 (9th Cir. 1985) 17

Houk v. Furman, 613 F.Supp. 1022 (1985) 28

Jaramillo v. Heaton, 100 P.3d 204 (N.M. Ct. App. 2004) 23, 24

Jefferson v. City of Tarrant, Alabama, 522 U.S. 75 (1997) 9, 10

Kane v. Shoup, 580 S.E.2d 555 (Ga. App. 2003) 20

Kenyon v. Hammer, 688 P.2d. 961 (Az. 1984) 24, 27

Lee v. Gaufin, 867 P.2d 572 (Utah 1993) 23, 24, 27

Cited Authorities

Page

Local No. 438 Construction & General Laborers' Union et al. v. Curry, 371 U.S. 542 (1963) 11, 12

Lyons v. Lederle Laboratories, 440 N.W.2d 769 (S.D. 1989) 23, 24, 27

Martinez v. California, 444 U.S. 277 (1980) 21, 28

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 15, 16, 19

Mominee v. Scherbarth, 503 N.E. 2d 717 (Ohio 1986) 23, 24, 27

Montagino v. Canale, 792 F.2d 554 (5th Cir. 1986) .. 17

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944) 25, 28

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945) 8, 9

Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983) 23, 27

Schwan v. Riverside Methodist Hospital, 452 N.E.2d 1337 (Ohio 1983) 23, 24, 27

Smith v. Cobb County-Kennestone Hospital Auth., 423 S.E.2d 235 (GA 1992) 17, 18, 19, 20, 25

State Board of Pharmacy v. Snyder's Drug Store, 414 U.S. 156 (1973) 10

Cited Authorities

Page

Statutes and Rules:

28 U.S.C. §1257 ..... 4, 5, 10, 11, 30

O.C.G.A. § 9-3-71 ..... *passim*

O.C.G.A. § 9-3-73 ..... *passim*

O.C.G.A. § 9-3-72 20

O.C.G.A. § 9-3-90 ..... 17, 18, 19

Ind. Code § 16-9.5-3-1 13

Ind. Code § 33-1-1.5-5 21

Medical Malpractice Act of New Mexico, N.M.S.A. §§ 41-5-1 *et seq.* 24

N.M.S.A. § 41-5-2 24

Rule 38(b)(1) of the Georgia Court of Appeals 10

STATEMENT OF THE CASE

This medical malpractice case arises out of one or more blood transfusions allegedly contaminated with HIV/AIDS that were administered to Petitioner Derek Canas ("Derek") when he was two months old. Derek received these blood transfusions at the MCG Hospital in Augusta, Georgia in January and February 1985, shortly before the FDA began screening blood for the HIV/AIDS virus. Derek was diagnosed with HIV sixteen years later in April 2001.

Petitioners filed suit against four defendants: (1) Dr. Sharon J. Kaminer, Derek's pediatric cardiologist who treated Derek at the Medical College of Georgia ("MCG") from 1991-2001; (2) The Board of Regents of the University System of Georgia d/b/a Medical College of Georgia ("BOR")[1] (Dr. Kaminer's employer at the time she treated Derek); (3) Dr. Ayman Al-Jabi, Derek's pediatrician from 1993-2000; and (4) MCG Health, Inc. ("MCGHI")[2], the entity that began operating the MCG Hospital on July 1, 2000, pursuant to a series of contracts with the BOR.

1. *Derek's Heart Procedure in 1985*

On January 18, 1985, six years before Derek's first appointment with Dr. Kaminer and eight years before his first appointment with Dr. Al-Jabi, Derek underwent a heart surgery to correct the transposition of his great arteries and his total anomalous venous return condition. As a result of the heart procedure and certain complications, Derek received multiple blood or blood product transfusions in January and February of 1985, which were allegedly tainted with HIV. Petitioners contend that Drs. Kaminer and Al-Jabi failed to recognize that, beginning as early as 1994, Derek had symptoms of HIV, and that they failed to have him tested or referred to a doctor for testing in a timely fashion.

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1. This Brief is filed jointly by all Respondents with the exception of the BOR, which elected to file its own Brief.

2. MCGHI is a 501(c)(3) non-profit corporation. Prior to July 1, 2000, MCGHI did not manage, own, lease, or operate the MCG Hospital. And, at no time has MCGHI ever employed any of the attending physicians, including Dr. Kaminer.

2. *Drs. Kaminer and Al-Jabi's Treatment of Derek*

Dr. Kaminer, at all relevant times, was a Pediatric Cardiologist at MCG. As a pediatric cardiologist, she was primarily responsible for Derek's cardiovascular care. She treated Derek from May 30, 1991, when Derek was approximately six years old, until February 15, 2001 (with a gap in treatment from 1996-2000).[3] When Derek went to MCG's Cardiovascular Clinic, Dr. Kaminer performed a routine cardiac physical exam, which included monitoring the pacemaker that was placed during his 1985 surgery. Dr. Al-Jabi was Derek's pediatrician who began seeing Derek in May of 1993. He last saw Derek in March of 2000. Throughout the time Dr. Al-Jabi followed Derek, he treated Derek for routine childhood illnesses, such as bronchitis, rhinitis, colds, respiratory infections or ear infections.

3. *Timing of Alleged Malpractice Committed by Drs. Kaminer and Al-Jabi*

Significantly absent from Petitioners' recitation of facts is the evidence from their expert witnesses regarding the alleged malpractice committed by Drs. Al-Jabi and Kaminer ("the Doctors"). The Petitioners' experts testified that a number of events should have raised red flags in the Doctors' minds that Derek was potentially HIV positive. Petitioners' experts contend that, in response to these red flags, the Doctors should have either referred Derek to a specialist for further evaluation or conducted further testing on their own.

Most significantly, Dr. Sleasman testified that Derek's treating physicians should have recognized, no later than 1994, that Derek had signs and symptoms consistent with HIV.[4]

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3. Dr. Kaminer saw Derek at approximate one-year intervals between May of 1991 and August of 1996. From August of 1996 and February of 2000, Derek's parents did not bring him to the MCG Cardiovascular Clinic for any exam or treatment, for reasons unknown to Dr. Kaminer. Derek then returned to see Dr. Kaminer on February 17, 2000 and she followed his care until his last visit on February 15, 2001.

4. Notably, Petitioners' experts have testified that Derek suffered from signs and symptoms of HIV/AIDS consistently from the time of his blood transfusions in early 1985.

Dr. Sleasman testified that, in addition to suffering from stunted growth, Derek had "recurrent pneumonia/ bronchitis, . . . chronic persistent diarrhea, which was called irritable bowel syndrome, and . . . persistent gingivostomatitis. Those were the four things that fulfilled the CDC criteria for HIV-associated conditions." According to Dr. Milligan, the Doctors should have recognized that Derek had stunted growth and should have made a referral to a medical specialist to evaluate the stunted growth when Derek was nine and one-half years old (or in 1994). Petitioners claim that, following 1994, the Doctors continued to fail to recognize or investigate Derek's HIV-related symptoms.

Petitioners filed suit on December 28, 2001, against Drs. Kaminer and Al-Jabi, almost two years after the five-year Georgia medical malpractice statute of repose expired (in the fourth quarter of 1999), and five years after the two-year Georgia medical malpractice statute of limitations expired (in the fourth quarter of 1996).[5] Each Respondent subsequently filed motions for summary judgment based upon the expiration of the statutes of repose and limitations (O.C.G.A. §§ 9-3-71 and 9-3-73). On September 19, 2005, the trial court entered an order partially granting and partially denying Respondents' motions. That order is currently pending on appeal before the Georgia Court of Appeals.

In a separate order dated October 14, 2005, the trial court expressly upheld the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73, as these statutes apply to medical malpractice claims of minors. Petitioners directly appealed this order to the Georgia Supreme Court, raising the same constitutional arguments being made before this Court. On February 27, 2006, the Georgia Supreme Court issued an order transferring the case to the Georgia Court of Appeals, holding that it had previously addressed and rejected the Petitioners' constitutional challenges to the subject statutes. Petitioners filed a motion for reconsideration before the Georgia Supreme Court, which was denied on April 13, 2006. Petitioners then filed the instant Petition for a Writ of Certiorari to this Court.

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5. The Complaint was later amended to add the BOR and MCGHI.

REASONS FOR DENYING THE PETITION

I. *This Court Does Not Have Jurisdiction to Review the Constitutionality of The Georgia Medical Malpractice Statutes of Repose and Limitations As There Is No "Final Judgment" As Required By 28 U.S.C. § 1257*

In support of their contention that this Court has jurisdiction to entertain the constitutional challenges raised in their Petition, Petitioners rely entirely upon 28 U.S.C. § 1257(a) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (without analysis or discussion), in support of their contention that the Georgia Supreme Court order issued on February 27, 2006 was a "final judgment". Petitioners are in error.

The statute cited by Petitioners, 28 U.S.C. § 1257(a), provides:

> Final judgments or decrees rendered by the highest courts of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of it being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Id. In defining the concept of finality, this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) undertook a detailed analysis of the concept and identified four categories of judgments in which finality existed such that this Court could exercise jurisdiction.

By way of background, in *Cox Broadcasting*, the appellant reporter, who was employed by a television station owned by the appellant broadcasting company, broadcasted the name of a rape victim during a news report. *Id.* at 473-74 (the identity of the victim was obtained from indictments, which were

public records). At the time of the broadcast, there was a criminal statute in place which made it a misdemeanor to broadcast a rape victim's name. *Id.* at 472. Following the broadcast, the rape victim's father filed suit against the reporter and his employer claiming a violation of the statute and a violation of his right to privacy. *Id.* at 474.

The trial court rejected the appellant's claim that the broadcast was privileged under both the First and Fourteenth Amendments. *Id.* at 474. The trial court further found that the criminal statute afforded the father a civil remedy and granted him summary judgment (finding that liability was established in the father's favor and that the determination as to damages would be determined at trial). *Id.* The reporter and Cox Broadcasting appealed to the Georgia Supreme Court, which "felt compelled to determine the constitutionality of the statute and sustained it as a 'legitimate limitation on the right of freedom of expression contained in the First Amendment.'" *Id.* at 475. The Georgia Supreme Court could discern "'no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection.'" *Id.* The reporter and Cox Broadcasting filed a petition for certiorari to this Court.

Before addressing the merits of appellants' claims as to the constitutionality of the rape victim statute, this Court analyzed whether it in fact had jurisdiction to entertain the Appellants' arguments. The Court began by noting that it only had power to review cases in which the state's highest court had issued a "[f]inal judgment or decree" in accordance with 28 U.S.C. 1257. *Id.* at 476 (noting that this statute limits the Court's power to review cases coming from state courts).

In assessing whether the Georgia Supreme Court's pronouncement was a final judgment on a constitutional issue, this Court noted that there "are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the

completion of the additional proceedings anticipated in the lower state courts." *Id.* at 477-78.

The four categories are:

> [(1)] those cases in which there are further proceedings-even entire trials-yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained . . . [(2) cases in which] the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings . . . [(3) cases] where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case . . . [and (4)] those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 479-83.

Based on the facts before it, the Court found that a final judgment did in fact exist for purposes of exercising jurisdiction. *Id.* at 485. More specifically, the Court found that the "Georgia Supreme Court decision is plainly final on the federal issue and is not subject to further review in the state courts." *Id.* The Court further explained that "[a]ppellants will be liable for damages if the elements of the state cause of action are proved. They may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the

statute, there should be no trial at all." *Id.* The Court further reasoned that:

> [i]f appellants prevail at trial and made unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the State Supreme Court that a civil action for publishing the name of a rape victim . . . may go forward despite the First and Fourteenth Amendments. Delaying final decision of the First Amendment claim . . . will 'leave unanswered an important question of freedom of the press under the First Amendment. . . . On the other hand, if we now hold that the First and Fourteenth Amendment bar civil liability . . . this litigation ends.

Id. at 486. Essentially, the Court found a final judgment under the fourth category described above.

In the instant Petition, the current status of the litigation posture does not support this Court's exercising jurisdiction under the final judgment rule. Respondents address each category in turn below.

A. Category 1: "those cases in which there are further proceedings-even entire trials-yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained."

The federal issue claimed in the Petition pertains to the constitutionality of the medical malpractice statutes of limitation and repose as they apply to minors. Regardless of whether this Court were to either uphold or reverse the proclamation of constitutionality, this case will undoubtedly continue in one form or another, both in the appeals process and before the trial court. More specifically, following the Georgia Supreme Court's opinion of February 27, 2006, upholding the constitutionality of the statutes, the Georgia Supreme Court transferred the case to the Georgia Court of Appeal for further disposition. Depending upon the outcome

of that appeal, the case will either be transferred back to the trial court for further proceedings or will likely be appealed to the Georgia Supreme Court by writ of certiorari. Hence, regardless of this Court's position on the constitutionality of the statutes, the case will not end before this Court. Additionally, there are other claims pending before the trial court that were not subject to either of the pending appeals. For this reason, this case does not satisfy the first category of final judgments.

B. Category 2: "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."

In discussing this category, *Cox Broadcasting* identified *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945) as an exemplary case. In *Johnson*, a party filed suit to prevent the transfer of operation of a radio station pursuant to a lease. The basis of the lawsuit was premised upon fraud. While the suit was pending, the Federal Communications Commission ("FCC") consented to the transfer of the license to operate the radio station.

The matter was appealed to the Nebraska Supreme Court which reversed (and entered judgment for the respondent), holding that the lease and license be set aside and that the original status of the parties be restored. The Nebraska Supreme Court further ordered an accounting of the operation of the station by the lessee and that the income less operation expenses be returned to the lessor. *Id.* at 122. On a motion for reconsideration, the petitioners asserted that only the FCC and the federal courts had jurisdiction. Denying the motion, the court clarified that the former opinion only vacated the *lease* of the radio station (as opposing to rendering an opinion on (licencing). *Id.* at 123 (acknowledging that issues of "licensing" or transferring of license/annulling licenses are powers reserved for the FCC).

This Court, in addressing the jurisdictional issue, found that "[b]ecause of the importance of the contention that the state court's decision had invaded the domain of the Federal

Communications Commission, we grant certiorari." *Id.* In support of granting certiorari, the Court essentially found that the pronouncement of the state supreme court essentially left nothing further to be done in the state court besides the accounting, such that there was finality. *Id.* at 125-27 (noting that the accounting left to be done in the trial court could not remotely raise federal questions such that the Court would have another opportunity to hear it); *see also Brady v. Maryland*, 373 U.S. 83, 85, n.1 (1963)(post-conviction motion for new trial based on evidence withheld by prosecution; found finality of judgment in that issue of retrial is a question independent of and unaffected by what may transpire in a trial); *Carondelet Canal & Navigation Co. v. State of Louisiana*, 233 U.S. 362 (1914).

Unlike *Radio Station WOW*, and as discussed *supra* in Section A, regardless of this Court's ruling in this case, there remains much litigation left in the underlying suit. This includes the matters pending before the Georgia Court of Appeals, the petition for certiorari to the Georgia Supreme Court following the Georgia Court of Appeals opinion (and to this Court) and a trial on issues and claims not subject to either of the instant appeals. Moreover, a resolution of the state law claims pending before the Georgia Court of Appeals could also moot the constitutional issues presented to this Court by finding that Petitioners' claims are not barred by either statute. *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997). Simply stated, there in no finality. *See generally Florida v. Thomas*, 532 U.S. 774 (2001) (finding no finality and noting Court could not assume that federal question would not later be presented to the Court). The second class of finality of judgment simply does not fit the facts before this Court.

C. Category 3: "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."

In this category of cases, as discussed by *Cox Broadcasting*, the parties, after having their case remanded to the state courts, have no further ability or avenue in which to bring the

constitutional issue back before this court. *Cox Broadcasting*, 420 U.S. at 481-82. More specifically stating, "[t]he federal issue would not survive the remand." *Id.* at 482 (citing *State Board of Pharmacy v. Snyder's Drug Store*, 414 U.S. 156 (1973)).

This category does not apply to the facts before this Court. As stated earlier, the posture of this case is unique in that there is also currently an appeal pending before the Georgia Court of Appeals. More specifically, upon the Georgia Supreme Court's affirming the constitutionality of the statutes of repose and limitations, it transferred the appeal to the Georgia Court of Appeals for resolution of the remaining issues in the case (i.e., what part of Petitioners' claims, if any, are barred by the Georgia statutes of repose and limitations). Given that the case is currently pending in the Georgia Court Appeals, further appeal to this Court is possible and quite probable.

When the Georgia Court of Appeals rules, the losing party (or parties) can petition the Georgia Supreme Court for certiorari. If that petition is denied, the party is entitled to again petition this Court for certiorari. *See* Rule 38(b)(1) of the Georgia Court of Appeals, which states in pertinent part: "Notice of intention to petition for certiorari shall be filed with the Clerk of this Court within 20 days after denial of a writ of certiorari by the Supreme Court of Georgia." At that point, this Court will then have the ability and option to address the constitutional issues presented in the current Petition. Alternatively, if the Georgia Supreme Court grants certiorari, upon issuing an opinion, either party may petition this Court for certiorari in accordance with 28 U.S.C. § 1257. *See generally Florida v. Thomas*, 532 U.S. 774 (2001) (finding no final judgment and noting that review of question could be had a later date in the case under the third category); *Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75 (1997) (finding that constitutional issues may come before court at a later time in the litigation process and declining to find a final judgment).

D. Category 4: "those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come."

In discussing this category, the *Cox Broadcasting* Court identified *Local No. 438 Construction & General Laborers' Union et al. v. Curry*, 371 U.S. 542 (1963). *Cox Broadcasting*, 420 U.S. at 483-84. In *Curry*, the Georgia Supreme Court upheld an injunction against a labor union's picketing of a construction site. The entry of the injunction was premised on an alleged violation of Georgia's right to work statute. *Curry*, 371 U.S. at 545. In contesting the injunction, the labor union claimed that the Georgia courts did not have jurisdiction to enter an injunction because the exclusive jurisdiction of the National Labor Relations Board preempted the entire litigation. *Id.*

In finding that it had jurisdiction under § 1257, the Court identified the relevant issues as "[w]hether or not the Georgia courts have power to issue an injunction[.]" *Id.* at 548. This issue was "wholly separate from and independent of the merits of respondents' cause" (i.e. "the legality of the union's picketing"). *Id.* at 548-550. The Court also found that "unless this judgment is reviewable now, petitioners will inevitably remain subject to the issuance of the temporary injunction ... and must face further proceedings in the state courts which the state courts have no power to conduct." *Id.*

The Court also found an additional independent basis for jurisdiction. The Court determined that "for all practical purposes the litigation in the Georgia courts terminated" with the issuance of the Georgia Supreme Court opinion. *Id.* at 551. The Georgia Supreme Court "not only finally asserted its

power to deal with the subject matter of this suit, but it also resolved the merits of the issues raised in the course of the hearing upon the temporary injunction." *Id.* Moreover, the petitioners admitted that there were no further factual or legal issues pending in the Georgia trial court. *Id.*

Unlike *Curry*, even should the statutes of repose and limitations be found to be unconstitutional, there will still remain an entire trial on the merits in the trial court. A reversal of the Georgia Supreme Court will not be "preclusive of any further litigation on the relevant cause of action." *Cox Broadcasting*, 420 U.S. at 482-83. Rather, it would only serve to broaden the scope of evidence to support Petitioners' claim for medical malpractice against the Respondents (i.e., allowing a claim for liability that occurred more than five years before Petitioners filed suit.). *See also Curry*, 371 U.S. at 551 (noting that there was no remaining litigation pending in the Georgia courts); *Cox Broadcasting*, 420 U.S. at 485 (finding that "if the Georgia court erroneously upheld the statute, there should be no trial at all" and that "the litigation could be terminated by [the Supreme Court's] decision on the merits").

Because the facts before this Court do not satisfy any of the four categories of "finality", this Court cannot take jurisdiction to entertain Petitioners' constitutional questions.

II. *The Georgia Statutes Do Not Violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.*

The federal constitutional issue in the petition is: do Georgia's statutes of limitations and repose applicable to a minor's medical malpractice claim violate the equal protection and due process clauses of the Fourteenth Amendment? The Petitioners contend that the statutes are unconstitutional because, unlike the general statute of limitations for personal injury actions, they require a minor to file a medical malpractice case before he reaches majority. The Petitioners specifically argue that the Fourteenth Amendment precludes the State of Georgia from expecting or requiring a minor "to discern when a medically negligent act has occurred." (Petition, p. 11.) They further claim that review is warranted

because other state courts have declared similar statutes unconstitutional. (Petition, pp. 19-30).

The Respondents explain below why the Petition does not warrant review. First, the Respondents show that the Georgia statutes do not deny the Petitioners equal protection or due process. Second, the Respondents distinguish those state court cases that the Petitioners claim support review.

A. *Equal Protection*

The threshold issue in analyzing the Petitioners' equal protection challenge is what level of scrutiny applies to the Georgia statutory classifications. The Petitioners contend that "heightened intermediate scrutiny" should apply. (Petition, pp. 25-30.) They cite no decisions of this Court which impose a heightened level of scrutiny for statutes that limit a minor's right to pursue a medical malpractice claim. Instead, they essentially argue that the Georgia Supreme Court erred in upholding the constitutionality of O.C.G.A. §§ 9-3-71 and 9-3-73 because such a ruling is inconsistent with its own prior decisions. (Petition, pp. 12-17.)

Thus, the issue remains: what level of scrutiny applies to statutes that supplant general tolling provisions and require a minor to bring a medical malpractice action before he reaches majority? The Seventh Circuit Court of Appeals addressed this issue in *Douglas v. Hugh A. Stallings, M.D., Inc.*, 870 F.2d 1242 (7th Cir. 1989). There, the parents of a disabled child filed a medical malpractice case against the estate and professional corporation of the physician who delivered the child. As a result of the physician's alleged negligence, the child sustained irreversible brain damage. The alleged negligence occurred in Indiana and, therefore, the Indiana statute of limitations applied. The Indiana statute provided a two-year limitations period for medical malpractice cases, except that "[i]f the injury occurs to a minor under the age of six, the action may be commenced any time before the child's eighth birthday." *Id.* at 1244, citing Ind. Code § 16-9.5-3-1. Under the pertinent facts, the parents had until 1977 to file suit, but they did not do so until 1984. The district court found that the Indiana statute of limitations barred the parents' action and awarded

summary judgment to the defendants. On appeal, the parents argued that the Indiana statute violated the equal protection and due process clauses of the Fourteenth Amendment, because minors such as their child "who will never be free of their legal disability . . . should be treated as a suspect class warranting strict scrutiny, or at a minimum, as a quasi-suspect class requiring heightened scrutiny." *Douglas*, 870 F.2d at 1245.

The Seventh Circuit began by identifying the proper level of scrutiny to apply.

> The success of plaintiffs' equal protection challenge to the malpractice statute of limitations turns on the level of scrutiny applied to the statutory classification. Economic or social legislation which does not involve suspect classifications or infringe on a fundamental interest is presumed constitutional and will be upheld if it is rationally related to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L. Ed. 2d 511, 96 S. Ct. 2513 (1976). It is a rare statute, indeed, which cannot withstand the minimal rational relationship analysis. *But see, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).

Douglas, 870 F.2d at 1245. Judge Cummings noted that the parents "have chosen an uphill battle in trying to persuade this Court that persons legally disabled because of minority and mental incapacity are a suspect classification." *Id.* The court rejected the parents' attempt to analogize the classification of mentally incompetent minors "to that of illegitimate children, who have been recognized by the Supreme Court as a quasi-suspect class warranting heightened scrutiny." *Id.* at 1246. In *City of Cleburne, supra*, this Court specifically declined "to extend either strict or heightened review to classifications involving the mentally retarded." *Douglas*, 870 F.2d at 1246, *citing City of Cleburne*, 473 U.S. at 446.

The Seventh Circuit then turned to classifications based on age.

> **Likewise, statutes which classify on the basis of age are subject only to the minimal rational relationship review.** 'While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a "history of purposeful unequal treatment" or been subjected to unique disabilities on the basis of stereo-typed characteristics not truly indicative of their abilities.' *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976). Although the classification contained in the malpractice statute of limitations disadvantages minors rather than the elderly as in *Murgia*, **the reasoning behind the Supreme Court's refusal to extend heightened scrutiny to classifications of the aged applies equally to this statute disadvantaging minors; i.e., when the characteristics of a statutory classification are relevant to the legitimate interests of the State, the judiciary need not closely scrutinize the legislation in question.... Legislative classification based on youth ... is clearly relevant to the state's *parens patriae* responsibilities toward minors.**

Douglas, 870 F.2d at 1246-1247 (emphasis added.). The court continued:

> The challenged statutory classification of minor children with permanent legal disabilities due to diminished mental capacity implicates the intersection of two characteristics, **which individually warrant only rational relationship review. The concurrence of these two characteristics does not change the Supreme**

Court's directive that age and mental capacity are often relevant statutory classifications which need only be rationally related to a legitimate state interest.

Id. at 1247 (emphasis added.).

Next, the court determined whether a rational relationship existed "between the classification of minors with permanent mental handicaps and the goals of the" Indiana statute. *Id.* The Indiana legislature enacted the medical malpractice statute of limitations "to address the concerns of rising medical costs and the need for comprehensive, affordable health coverage." *Id.* It also "sought to control the escalation of malpractice awards and concomitant increases in insurance premiums and health care costs by modifying the procedural rules for litigation." *Id.* at 1248. Relying on *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945) and *G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982), the Seventh Circuit observed that "[i]n general, statutes of limitations provide a desired order and finality to the litigious process by way of an albeit arbitrary, but bright line." *Douglas, id.* The court then found that "[c]reating a shorter period of limitations in which to commence actions against health care providers is clearly a rational legislative response to the fiscal uncertainties in the health care industry." *Id.* While sympathetic to the parents and their child, the court was "compelled to find that the limits imposed by the malpractice statute of limitations are certainly rationally related to the stated goals of preventing stale claims and controlling the cost of medical care." *Id.* at 1249.

Here, the Petitioners challenge the Georgia statutes for classifying minors with medical malpractice claims differently from minors with other types of tort claims. Similar to the parents in *Douglas*, the Petitioners frame the statutory classification "by contrasting the general tolling statute of limitations with the more limited malpractice tolling period." *Id.* at 1245. *Douglas* and, more importantly, *Murgia* establish that statutory classifications based on age are subject to

"rational relationship review."[6] This level of scrutiny requires the Petitioners as the challenging party to show that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993), *quoting FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Therefore, the Petitioners must show that O.C.G.A. §§ 9-3-71 and 9-3-73 are not rationally related to a legitimate state interest, and in doing so must refute (1) the Georgia General Assembly's clearly stated objectives and (2) the Georgia Supreme Court's determinations that the subject statutes satisfy the applicable level of scrutiny.

O.C.G.A. § 9-3-71(a) provides a two-year statute of limitations for medical malpractice actions, and O.C.G.A. § 9-3-71(b) imposes a five-year statute of "ultimate repose and abrogation." *See* O.C.G.A. § 9-3-71(c). Prior to 1987, O.C.G.A. § 9-3-90(a) tolled the statutes of limitations and repose as they applied to a minor's cause of action for medical malpractice. *See Smith v. Cobb County-Kennestone Hospital Auth.*, 423 S.E.2d 235, 236 (Ga. 1992). However, in 1987 the Georgia General Assembly amended O.C.G.A. § 9-3-73 and "significantly

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6. Other federal circuit courts of appeals have applied the rational basis test in rejecting equal protection challenges to legislation creating classifications in the medical malpractice context. *See Gronne v. Abrams*, 793 F.2d 74, 77-78 (2nd Cir. 1986)(New York "statutory distinctions" between medical malpractice plaintiffs and other tort plaintiffs do not amount "to the sort of invidious discrimination prohibited by the fourteenth amendment"); *Montagino v. Canale*, 792 F.2d 554, 556-557 (5th Cir. 1986)(Louisiana medical malpractice statute of limitations "does not impinge on a fundamental right . . . or involve a suspect classification"); *Hoffman v. United States*, 767 F.2d 1431, 1435-1436 (9th Cir. 1985)(California statutory cap on noneconomic losses in medical malpractice cases "does not involve any suspect or quasi-suspect classification, a fundamental right, or a classification requiring a heightened scrutiny"); *Brubaker v. Cavanaugh*, 741 F.2d 318, 321 (10th Cir. 1984)(analyzing Kansas medical malpractice statute of limitations and finding "that a rational relation exists between the shorter limitation period for health care providers and the legitimate objective of providing quality health care in Kansas"); *DiAntonio v. Northampton-Accomack Memorial Hosp.*, 628 F.2d 287, 291-292 (4th Cir. 1980)(Virginia legislation found not to violate equal protection because "[t]he different treatment of medical malpractice plaintiffs from other tort plaintiffs is not a denial of equal protection, when the special problems posed by soaring insurance costs are considered").

restricted the period of disability that would toll the operation of O.C.G.A. § 9-3-71." *Smith, id.*

As amended, O.C.G.A. § 9-3-73(b) states that, notwithstanding the general tolling provision in O.C.G.A. § 9-3-90(a),

> all minors who have attained the age of five years shall be subject to the periods of limitations for actions for medical malpractice provided in this article [the two-year limitations period in O.C.G.A. § 9-3-71(a)]. A minor who has not attained the age of five years shall have two years from the date of such minor's fifth birthday within which to bring a medical malpractice action if the cause of action arose before such minor attained the age of five years.

O.C.G.A. § 9-3-73(c)(2)(A) and (B) require a medical malpractice action on behalf of a minor to be commenced before his tenth birthday if he was under the age of five on the date the malpractice occurred, or within five years from the date of the wrongful act if the minor was five or older on that date. O.C.G.A. § 9-3-73(b) is a statute of limitations for minors' medical malpractice claims; O.C.G.A. § 9-3-73(c) is a statute of repose. *See* O.C.G.A. § 9-3-73(d). The 1987 amendment also contained O.C.G.A. § 9-3-73(f), which states:

> The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, preventing stale medical malpractice claims, and providing for the public safety, health, and welfare as a whole.

The Georgia Supreme Court has rejected several constitutional challenges to the post-1987 versions of O.C.G.A.

§§ 9-3-71 and 9-3-73. In *Smith, supra*, the court rejected an equal protection challenge to O.C.G.A. § 9-3-73(b). Applying a rational basis test, the court held "that the separate classification of minors for purposes of medical malpractice actions could accomplish the stated legislative objectives," namely those stated in O.C.G.A. § 9-3-73(f). *Smith*, 423 S.E.2d at 239. In *Craven v. Lowndes County Hosp. Auth.*, 437 S.E.2d 308 (Ga. 1993), the plaintiff argued that O.C.G.A. § 9-3-71(b) denied him equal protection of the law because it "creates an arbitrary classification" of medical malpractice claimants. *Id.* at 309. In rejecting this argument, the court applied the rational basis test and identified multiple state interests furthered by O.C.G.A. § 9-3-71(b): "Because of the nature of the practice of medicine, uncertainty over the causes of illnesses and injury make it difficult for insurers to adequately assess premiums based on known risks. Furthermore, the passage of time makes it more difficult to determine the cause of injury, particularly in diseases where medical science cannot pinpoint the exact cause." *Id.* at 310. *Crowe v. Humana, Inc.*, 439 S.E.2d 654 (Ga. 1994) involved another equal protection attack on O.C.G.A. § 9-3-73(b). The plaintiffs, parents of a minor child, contended that "O.C.G.A. § 9-3-73(b) violates constitutional equal protection guarantees by excluding minors bringing medical malpractice actions from the general period of disability provided by O.C.G.A. § 9-3-90, and by establishing an arbitrary and unreasonable period of disability." *Id.* at 655. The court found that it already decided this issue adversely to the plaintiffs in *Smith, supra. Crowe, id.*

These decisions of the Georgia Supreme Court are consistent with this Court's determination in *Murgia* that the rational basis test applies to legislation containing age-based classification. Moreover, the Georgia General Assembly has identified rational, legitimate reasons for separately classifying minors for purposes of medical malpractice cases. *See* O.C.G.A. § 9-3-73(f); *Douglas*, 870 F.2d at 1248-1249. The Petitioners have pointed to no decisions of this Court that require a different result, and they certainly have not met their burden of showing why this Court should reject the Georgia General Assembly's "stated legislative objectives." Therefore, the Georgia Supreme

Court correctly held in this case (as well as in *Smith*, *Craven* and *Crowe*) that O.C.G.A. §§ 9-3-71 and 9-3-73 do not violate the equal protection clause of the Fourteenth Amendment.

B. Due Process

The Petitioners also challenge O.C.G.A. §§ 9-3-71 and 9-3-73 on due process grounds. They argue that due process requires a "discovery rule"[7] for limitations and repose purposes "where the patient has not discovered either the negligent act or the resultant injury." (Petition, p. 17.) In the medical malpractice context, Georgia law applies the discovery rule only to those situations where a foreign object is left in the patient: the limitations period does not begin to run until after discovery of the negligent act, i.e. the failure to remove or identify the foreign object. *See* O.C.G.A. § 9-3-72. For all other medical injuries, the statute of limitations begins to run at the first manifestation of an injury[8], and the statute of repose "runs from the date on which the negligent or wrongful act or omission occurred without regard to when the injury arising from the negligent or wrongful act or omission occurred or was discovered." *Christian v. Atha*, 598 S.E.2d 895, 896 (Ga. App. 2004). According to Petitioners, applying the discovery rule only to retained foreign object cases "is arbitrary, unconscionable and denies due process because patients, particularly minor ones, lack the competence and the education to discern when a medically negligent act has occurred, and children have no ability to ensure the protection of their rights by age seven or ten, as O.C.G.A. § 9-3-73 prescribes." (Petition, p. 11.)

The Seventh Circuit rejected a very similar argument in *Douglas, supra.* The plaintiffs there argued that "application of the occurrence rule which ties the running of the limitations

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7. Under this theory, the statutes of limitation and repose would not attach and begin to run until the plaintiff knew he was injured, could identify his injury *and* the cause of his injury.

8. The one exception occurs in cases of misdiagnosis of an existing condition, such as the case before this Court, when the statute of limitation attaches and begins to run on the date of the misdiagnosis. *See Kane v. Shoup*, 580 S.E.2d 555 (Ga. App. 2003).

period to the occurrence of the act or omission causing the injury denie[d] them access to court before they [were] aware of the existence of a cause of action." *Douglas*, 870 F.2d at 1249. The court began by dismissing the plaintiffs' premise "that due process requires the state to toll the statute of limitations for persons with legal disabilities such as minority or mental handicap." *Id.* States can modify general tolling provisions without violating due process, just as Indiana did in limiting the general tolling statute's applicability to product liability actions. *See* Ind. Code § 33-1-1.5-5. *Douglas, id.*

The plaintiffs also claimed that "due process requires an indefinite length of time" for filing medical malpractice actions, particularly since the general tolling statute preexisted the malpractice statute of limitations. *Id.* The court disagreed, holding that "a tolling statute, like any procedural rule, cannot vest plaintiffs with a substantive right in the continued protection of that rule." *Id. See also Chase Securities Corp. v. Donaldson*, 325 U.S. at 314 (1945). Again explaining that legislatures can modify procedural rules, the Seventh Circuit cited this Court's pronouncement in *Martinez v. California*, 444 U.S. 277, 282 (1980), "that the state's interest in fashioning its own rules of tort law is paramount to any discernible federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Douglas*, 870 F.2d at 1250.

The *Douglas* court concluded with what is essentially the Respondents' position in this case.

> As discussed *supra*, the malpractice statute of limitations is clearly rationally related to its goal of relieving the malpractice insurance crisis. It is the province of the Indiana legislature to allocate the increased cost of health care between the health care providers, insurance carriers and patients and to determine under what circumstances it is appropriate to delay the running of the statute of limitations in spite of the increased risk of lost evidence and lapse of memory. The state need not provide a tolling provision for minority and mental

> incompetence or a discovery rule in order to comply with the due process guarantees of a meaningful opportunity to be heard.

Id.

III. ***Contrary to Petitioners' Claims on Pages 9-10 and 19-30 of Their Petition, There Are Not Square Conflicts Between the Georgia Courts' Constitutional Analyses of its Medical Malpractice Statutes of Limitation and Repose and Other State and Federal Courts' Constitutional Analyses of Those Respective States' Medical Malpractice Statutes of Limitation and Repose.***

A. Cases cited by Petitioner as conflicting with Georgia courts' constitutional analyses of Georgia's statutes of limitation and repose are distinguishable as: (1) the relevant statutes cited in those cases are dissimilar to Georgia's statutes of limitation and repose; and (2) cases cited by Petitioner were held to be unconstitutional as a matter of state constitutional law, and not as a matter of federal constitutional law.

(1) The state statutes cited by Petitioners as "conceptually indistinguishable" (Petition, p. 9) from Georgia's statutes of limitations and repose are in fact dissimilar to Georgia's statutes in several ways: (a) most of the cited statutes of limitation attach and begin to run on the date of the negligent act, whereas O.C.G.A. §§ 9-3-71(a) and 9-3-73(b) do not attach and begin to run until an injury arising from a negligent act first manifests itself; (b) most of the cited statutes of repose have terms that are shorter than the five year term in O.C.G.A. § 9-3-71(b) and the five to ten year terms for minors in O.C.G.A. § 9-3-73(c); (c) health care providers can opt-in or opt-out of the protections of some of the limitations statutes which Petitioner cites; (d) these statutes are usually part of larger medical malpractice acts, the purposes of which are to create statutory medical malpractice insurance funds to cover those providers who opt-in to and pay fees to these statutorily created insurance funds; (e) the state and/or federal courts reviewing the majority of the limitations statutes Petitioners

cite found that the sole purpose of the legislation was to combat a perceived medical malpractice crisis, but they fail to take into consideration and to discuss the difficulties and consequences of litigating stale claims; (f) the prevention of stale claims is stressed as one of the stated objectives of the Georgia statutes, and the reasoning of the Georgia appellate courts in finding O.C.G.A. §§ 9-3-71 and 9-3-73 constitutional is heavily influenced by the undesirable alternative consequences of statutorily mandated litigation of stale claims which could conceivably result in tolling a minor's claim for as many as twenty-three years after the negligent act; and (g) at least one of the limitations/repose statutes Petitioners cite does not act as a limitation at all because the state courts decide whether or not to enforce the statute depending on the judges' subjective beliefs as to what may be reasonable or unreasonable under the circumstances of individual cases.

The statutes of limitation from New Mexico, South Dakota and Texas[9] which Petitioners allege to be indistinguishable from Georgia's statutes of limitation in O.C.G.A. §§ 9-3-71(a) and 9-3-73(b) (*See*, Petition, pp. 9, 19-21, 25, and 28-29), actually run from the date of the negligent act which is/can be much earlier than the point at which Georgia's statutes attach and begin to run; *i.e.*, from the date of the first manifestation of an injury. Furthermore, the statutes of repose in New Mexico, South Dakota, Texas, Utah, and Ohio,[10] which Petitioners allege to be indistinguishable from O.C.G.A. §§ 9-3-71(b) and 9-3-73(c), are actually shorter than the five year term set out in O.C.G.A. § 9-3-71(b) and the five to ten year terms set out in O.C.G.A. §9-3-73(c). Had the courts of these states had the opportunity to apply statutes of limitation and repose identical to Georgia's, which attach at the point when the injury first manifested itself (*See*, O.C.G.A. §§ 9-3-71(a) and 9-3-71(b)), and

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9. *See Jaramillo v. Heaton*, 100 P.3d 204, 206-207 (N.M. Ct. App. 2004), *Lyons v. Lederle Laboratories*, 440 N.W.2d 769, 770 (S.D. 1989), and *Sax v. Votteler*, 648 S.W.2d 661, 663 (Tex. 1983).

10. *See Jaramillo*, 100 P.3d at 206-207, 208; *Lyons*, 440 N.W.2d at 770; *Sax*, 648 S.W.2d at 663; *Lee v. Gaufin*, 867 P.2d 572, 574 (Utah 1993), *Schwan v. Riverside Methodist Hospital*, 452 N.E.2d 1337, 1338 (Ohio 1983), *Mominee v. Scherbarth*, 503 N.E. 2d 717, 719-720 (Ohio 1986).

which provide minors with a five to ten year period after the negligent act before the statute of repose abrogates their claims (*See* O.C.G.A. § 9-3-73(c)), the outcomes of these cited cases may well have been different.

Additionally, in New Mexico, health care providers can either opt-in to the protections of the state's three year statute of limitation/repose by paying $600,000.00 to the state superintendent of insurance and by making regular payments into the statutorily created insurance fund; or, if they choose not to invest these amounts, they do not get the protection of the three year statute of limitation/repose in the New Mexico Medical Malpractice Act.[11] Whereas, Georgia's medical malpractice statutes of limitation and repose apply to all licensed physicians in Georgia; nobody gets to "opt-in" or "opt-out". Furthermore, the New Mexico courts are not consistent in their application of the state's statute of limitation/repose as the courts may decide not to enforce the statute at all in any given situation depending on whether the judges think its effects would be "unreasonable" under the circumstances of the individual case.[12]

In the cases Petitioners cite from New Mexico, South Dakota, Texas, Utah, Ohio and Arizona, the purpose or objective given for each state's medical malpractice statutes of limitation and/or repose is primarily, if not completely, limited to addressing the perceived medical malpractice crisis facing that state or the nation as a whole.[13] The Petitioners expend a great deal of ink denouncing the validity of the states' use of their perceived medical malpractice crises as the basis for the implementation of their respective medical malpractice statutes of limitation and repose (*See* Petition, pp 21-23, 27 and 29); however neither the Petitioners nor the cited opinions

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11. *See the Medical Malpractice Act of New Mexico*, N.M.S.A. §§ 41-5-1 et seq.

12. *Jaramillo*, 100 P.3d at 207.

13. *See Jaramillo*, 100 P.3d at 208; N.M.S.A. § 41-5-2; *Lyons*, 440 N.W.2d at 771; *Sax*, 648 S.W.2d at 666; *Lee*, 867 P.2d at 576; *Schwann*, 452 N.E. 2d at 302; *Mominee*, 503 N.E.2d at 721; *and Kenyon v. Hammer*, 688 P.2d. 961, 964 (1984).

dedicate any amount of discussion to the consideration of the difficulties and consequences of litigating stale claims when determining whether the states' objectives are legitimate and whether the statutes in question are rationally related to those objectives. Whereas, prominent in the opinions of Georgia's appellate courts are the acknowledgments and discussions that the objectives of Georgia's medical malpractice statutes of limitation and repose are to avoid the difficulties and consequences of litigating stale claims.

The Georgia Supreme Court opined in *Allrid v. Emory University*, 285 S.E.2d 521 (Ga. 1982) and *Smith et al. v. Cobb County-Kennestone Hospital Authority*, 423 S.E.2d 235, 240 (Ga. 1992):

> Statutes of limitation . . . in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

This Court may recognize these words and phrasing as they are almost identical to those in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944), and *Chase Securities Corp., v. Donaldson et al., Executors*, 325 U.S. 304, 314 (1945) concerning the purposes of limitations statutes. The *Chase* Court elaborated further:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. [internal cite omitted]. They are by definition arbitrary, and their operation

> does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the *privilege to litigate.*

Chase, 325 U.S. at 314 (emphasis added).

In *Craven v. Lowndes County Hospital Authority*, 437 S.E.2d 308 (Ga. 1993), the Georgia Supreme Court reiterated its opinion that Georgia's medical malpractice statutes of limitation and repose were rationally related to the legitimate interest of the state in eliminating stale claims:

> This amounts to a recognition that the legislature may conclude that the time may arrive when past transgressions are no longer actionable. *The long history of such conclusions emphasizes their rationality.* From the biblical time of the Year of Jubilee to the present day, policymakers have exercised the right to "wipe the slate clean" after a fixed period of time. In doing this, there is a clear distinction between a statute of limitation "barring" an action, and a statute of repose providing for abolition of a cause of action after the passage of the time provided. We cannot say that the legislature acted irrationally when it amended the statute in question.

Craven, 437 S.E.2d at 31 (emphasis added).

In text, extent, intent and purpose, the medical malpractice statutes of limitation and repose Petitioners cite as being indistinguishable from O.C.G.A. §§ 9-3-71 and 9-3-73 are in fact very distinguishable as explained, *supra*; and the constitutional analyses of these allegedly similar statues can, therefore, only be different from the constitutional analyses of Georgia's statutes.

(2) Cases and their constitutional analyses cited by Petitioners as conflicting with Georgia's appellate courts' constitutional analyses of its medical malpractice statutes of limitation and repose were decided as a matter of state

constitutional law, and not as a matter of federal constitutional law.

There is no prohibition against a state constitution providing to its citizens rights and protections in addition to those provided by the U.S. Constitution. *Sax*, 648 S.W.2d at 664. The statutes cited from New Hampshire, South Dakota, Texas, Arizona, Utah and Ohio were all found to violate various provisions of those states' constitutions[14] which have no counterparts in the federal constitution. The courts either held that: the right to recovery for personal injury and/or the right to access to the courts were fundamental or important substantive rights under their constitutions; or that the states' constitutions included open courts provisions; or that the statutes created suspect or quasi-suspect classes; and therefore, the statutes in question had to undergo strict or elevated scrutiny to pass constitutional muster.[15] Georgia does not have similar additional provisions in its constitution, which instead tracks the U.S. Constitution. Therefore, since Georgia's statutes of limitation and repose do not impinge on a fundamental or important substantive right guaranteed by the federal constitution, and they do not involve a suspect or quasi-suspect class, they must only undergo rational basis scrutiny in order to be constitutional.[16]

B. Statutes of limitation and repose are exactly those types of legislation which may conflict from state to state because they are examples of social and economic legislation, for which the Equal Protection clause of the Fourteenth Amendment gives legislatures wide latitude to formulate.

Legislatures are given wide latitude in formulating social and economic legislation based on the individual state's goals

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14. *See Carson v. Maurer*, 424 A.2d 825, 831 (1980); *Lyons*, 440 N.W.2d at 770-772; *Sax*, 648 S.W.2d at 664-667; *Kenyan*, 688 P.2d at 968-975; *Lee*, 867 P.2d at 577-589; *Schwann*, 452 N.E.2d at 301-303; *and Mominee*, 503 N.E.2d at 720-722.

15. *Id.*

16. *City of New Orleans*, 427 U.S. at 303.

and governmental interests.[17] Courts are reluctant, as they should be in our federal system with our respect for the separation of powers, to closely scrutinize legislative choices as to whether, how, and to what extent those interests should be pursued. *City of Cleburne*, 473 U.S. at 441. To be constitutional, the Equal Protection Clause requires only a rational means to serve a legitimate end. *Id.*, at 442. Courts must refrain from acting as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in the legislative sphere. *Houk v. Furman*, 613 F.Supp. 1022, 1030 (1985) *citing City of New Orleans*, 427 U.S. at 303; see also, *Martinez*, 444 U.S. at 283 ("As federal judges we have no authority to pass judgment on the wisdom of the [legislature's] underlying policy determination").

Because of the wide latitude given in formulating social and economic legislation, it is not a surprise that states may address similar problems with widely varying legislation, or that they may use similar legislation to address very different problems. Regardless, these statutes are presumed valid and not in violation of the equal protection clause or the due process clause of the Fourteenth Amendment to the U.S. Constitution as long as they do not concern a suspect class or a fundamental right or gender or illegitimacy, and they must be rationally related to a legitimate governmental interest.[18] In order to make this determination the courts must answer two questions: (1) Does the legislation have a legitimate purpose; and (2) Was it reasonable for lawmakers to believe that implementation of the statutes in question would promote that legitimate purpose.

The main underlying purpose of Georgia's medical malpractice statutes of limitation and repose is the prevention and elimination of stale claims, which has been found by the state supreme court to be a legitimate governmental interest, as discussed previously. Moreover, this Court in *Chase* and *Order of Railroad Telegraphers* has recognized the prevention and elimination of stale claims as a legitimate governmental

17. *City of Cleburne*, 473 U.S. at 440.

18. *City of New Orleans*, id.

interest; most, if not all, state and federal courts would be hard-pressed to disagree.

In response to the second question involved in rational basis scrutiny, it was and is certainly reasonable for Georgia lawmakers to believe that a two year statute of limitation for medical malpractice claims of adults and minors over the age of five, would promote the legitimate objective of eliminating stale claims; especially when the alternative suggested by Petitioners would allow minors to wait as many as twenty years to bring a claim, at which time the disability of minority would be removed.[19] Likewise, it was and is certainly reasonable for Georgia lawmakers to believe that the five year statute of repose for adults and minors age five and older, and the repose statute for minors injured prior to age five which does not expire until the minor's tenth birthday, would promote the legitimate purpose of eliminating state claims; especially when the alternative for minors suggested by the Petitioners would be to toll the five year statute of repose until the child reaches majority, which could conceivably allow as many as twenty-three years to pass before the minor's cause of action would be abolished. In this amount of time memories will no doubt fade, witnesses will disappear and/or die, and evidence will most definitely be lost, making the successful pursuit and/or defense of that claim almost impossible for either the plaintiff or the defendant.

Georgia's interest in preventing and eliminating stale claims is legitimate, and its medical malpractice statutes of limitation and repose rationally promote that interest. These statutes do not involve suspect classes, fundamental rights, or issues of gender or illegitimacy, therefore they must only survive rational basis scrutiny to be constitutional. As demonstrated by Respondents' brief, *supra*, Georgia's medical malpractice statutes of limitation and repose are constitutional, and Petitioners' premature petition for certiorari should be denied.

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19. Majority status in Georgia is eighteen years old. Therefore, if the two year statute of limitation is determined to be tolled until a minor turns eighteen, then it is possible that twenty years could elapse before a minor is required to file his claim.

CONCLUSION

The Petition does not warrant review. The Petitioners cannot establish that this Court has jurisdiction under 28 U.S.C. §1257(a) in order to address the constitutional challenges raised by Petitioners. In fact, the Respondents have affirmatively shown the lack of any such jurisdiction. Nor can the Petitioners carry their burden of showing that the Georgia statutes are unconstitutional. The Respondents have shown that the rational basis test applies to the statutes and that the Georgia legislature and judiciary have identified legitimate justifications for the statutory classification. And, the Respondents have further demonstrated that there is no true conflict among the state courts in this country in their analyses of their respective statutes of repose and limitations. For these reasons, Respondents respectfully urge this Court to deny Petitioners' Petition.

Respectfully submitted,

WILLIAM P. FRANKLIN, JR.
LESLIE PICKETT SHEEHAN
OLIVER MANER & GRAY LLP
P.O. Box 10186
Savannah, GA 31412
Attorneys for Respondent Ayman Al-Jabi, M.D.

JAMES S. V. WESTON
HULL, TOWILL, NORMAN, BARRETT & SALLEY
P.O. Box 1564
Augusta, GA 30903-1564
Attorneys for Respondent MCG Health, Inc.

ADAM L. APPEL*
KIM M. RUDER
CARLOCK COPELAND SEMLER & STAIR, LLP
2600 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, GA 30303
(404) 522-8220
Attorneys for Respondent Sharon J. Kaminer, M.D.

* *Counsel of Record*